UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MATTHEW G. SILVA, Plaintiff, v. LARRY MAYES, et al., Defendants.	CASE NO. C04-1885-JLR REPORT AND RECOMMENDATION

Introduction

Plaintiff proceeds *pro se* and *in forma pauperis* in this 42 U.S.C. § 1983 action. He names as defendants in his first amended complaint Larry Mayes, King County, Ron Sims, Reed Holtgeertz, Bob DeNeui, Teri Hansen, Sue Belt, Herb Myers, Jerry Hardy, M.D. Woodbury, Ms. Kramer, Sergeants Hjellen and Jones, and correction officers Coleman, Dejesus, Lockhart, Rogers, Sabo, as well as unnamed correction officers. (Dkt. 11.) Plaintiff asserts twenty-one counts against defendants, including allegations of punishment without due process (counts 1, 3, 6, 7, 8, 16); retaliation (counts 4, 9, 10, 17); failure to supervise/train (counts 2, 5); procedural due process violations (counts 11, 12, 13, 14, 18, 19, 20); a substantive due process violation (count

15); and a freedom of religion complaint (count 21). (*Id.*)

This matter comes before the Court on plaintiff's motion for partial summary judgment (Dkt. 81) and defendants' motion for summary judgment and dismissal of plaintiff's claims (Dkt. 137.) It should be noted that, although he did not present any statement of facts or argument in response to defendants' motion, plaintiff did reply that the claims in his amended complaint are true and accurate and asked that defendants' motion be stricken. (Dkt. 190.) It should also be noted that, upon its request, the Court received supplemental briefing from the parties with respect to plaintiff's motion. (*See* Dkts. 196, 205, & 207.)

Having considered the papers and pleadings submitted by the parties, as well as the balance of the record in this matter, it is recommended that plaintiff's motion be denied, that defendants' motion be granted, and that this matter be dismissed.

Proposed Findings of Fact

Plaintiff submitted his first amended complaint as a pretrial detainee at the King County Regional Justice Detention Center (RJC) in Kent, Washington. At some point during the course of these proceedings, plaintiff was convicted and held at the RJC as a post-trial detainee. He is now being held at a different correctional facility.

Upon entering the RJC as a pretrial detainee on April 5, 2004, RJC staff classified plaintiff as a "close custody" or "close security" inmate. (Dkts. 22, 97, & 142.) RJC staff base initial classification decisions on consideration of the current charge and previous convictions. (*Id.*) The RJC considers close security inmates to be a part of the general population, but with a higher security level classification. (Dkts. 21 & 22.)

As a close security inmate, RJC staff housed plaintiff in the facility's D-Unit. Although

considered by the RJC to be the primary location for close security inmates, the D-Unit houses both close and "medium" security inmates, the latter being a lower security level within the general population of inmates.[1] (*Id.*) Inmates in the D-Unit face greater restrictions than those in some other RJC housing units. D-Unit inmates must remain in their cells for all but three hours a day[2], eat meals in their cells rather than in a group setting, and have different access to religious programming. (*See* Dkts. 21, 22, & 97.) With respect to the latter issue, plaintiff maintains that no group worship is accessible in the D-Unit, while defendants first maintained that religious programming is available on an individual, rather than a group basis (*see* Dkt. 22 at 2), and later asserted the availability of a bi-weekly church service, in addition to individual counseling upon request (*see* Dkt. 97 at 4). Also, plaintiff maintains that D-Unit conditions are inferior with respect to cleaning supplies, mattresses, hair care supplies, and cell temperatures, while defendants aver that the D-Unit is treated the same as other units in these respects.

The RJC allows inmates to "override" classification from close to medium security. (Dkts. 22 & 97.) Department of Adult and Juvenile Detention (DAJD) policy defines an override as "an increase or decrease in the assigned security level based on consideration of factors such as behavior, case notoriety, [or] type of criminal history or risk." (Dkt. 76, Ex. A.)

The RJC is a direct supervision jail, meaning one officer directly supervises a group of

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[1] It is unclear whether the D-Unit continues to house both close and medium security inmates to this day. (*See* Dkt. 57 at 2.) However, this issue is not pertinent to the resolution of the pending motions for summary judgment.

[2] Plaintiff states that medium-security inmates are allowed outside of their cells eight to nine hours a day. (Dkt. 81 at 3.) Defendants note that inmates in Administrative Segregation and Disciplinary Segregation must remain in their cells twenty-three hours a day. (Dkt. 97, ¶ 9.)

inmates. (Dkt. 142.) An officer arriving on shift verbally conveys expectations for that shift to the inmates. (*Id.*) Upon determining that these expectations have not been met, an inmate is subject to an "onsite adjustment." (*Id.*, ¶¶ 4-6.) An officer renders an onsite adjustment for behavior not considered serious enough to warrant an infraction and subsequent discipline, such as disciplinary segregation or loss of good-time. (*Id.*)

Plaintiff's first override from close to medium security lasted from May 19, 2004 until June 18, 2004. (Dkt. 97, Ex. A.) During that time, he was subject to onsite adjustments by officers on shift in his unit, including being "racked back" to his cell for certain periods of time. (*See* Dkts. 11 & 142.) Plaintiff was racked back to his cell for not making his bed properly and for failing to close his cell door. (*Id.*) In other instances, plaintiff was a part of a group of inmates racked back to their cells for determinations of unacceptable behavior, including a derogatory comment made by one inmate and noise level in the unit. (*Id.*)

On June 13, 2004, Officer Sabo infracted plaintiff for stating "this is bullshit" and kicking his cell door. (*See* Dkt. 11, App. 15.) Documentation supports that the hearing on this matter occurred either on June 17, 2004 (*see* Dkt. 97, Ex. B), as plaintiff contends, or on the preceding day (*see* Dkt. 11, App. 15). Based on plaintiff's admission that he used the word "bullshit," he was found guilty of being defiant and insolent; he was not found guilty of any violation in response to the alleged kicking of his door. (*Id.*) The RJC imposed three days disciplinary deadlock as a result of this infraction, but suspended the punishment, and denied his appeal. (*Id.*) Also, pursuant to a periodic review, the RJC revoked plaintiff's override, on June 18, 2004, for "defiant behavior" and "non-compliance with directives and unit expectations." (Dkt. 97, Ex. C (altered to lower case in quotations)).

Plaintiff's second override occurred between July 22, 2004 and July 31, 2004. (*Id.*, Ex. A.) On July 31, 2004, Officer Coleman racked plaintiff back to his cell for not properly making his bed. (*See* Dkt. 140, Ex. A.) She described a verbal confrontation she had with plaintiff relating to this onsite adjustment in an incident report on that same date. (*Id.*) The RJC consequently revoked plaintiff's override based on "persistent[] challenge[s]" to Officer Coleman and "ongoing challenging and disruptive behavior." (Dkt. 97, Ex. C (altered to lower case in quotations.)) This was deemed plaintiff's "last opportunity for an override for the duration of [his] booking." *Id.*[3]

Plaintiff filed a substantial number of grievances and kites during his stay at the RJC. (*See*, *e.g.*, Dkts. 11 & 142.)

Proposed Conclusions of Law

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c);*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex*, 477 U.S. at 322-23. "[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but . . . must set forth

[3] Plaintiff asserts his placement in medium security on three separate occasions. However, documentation submitted by defendants shows only two overrides to medium security. (*See* Dkt. 97, Exs. A & C.) In any event, based on the discussion of overrides below, any dispute as to this issue is not material.

specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (citing Fed. R. Civ. P. 56(e)).

Plaintiff here pursues claims pursuant to 42 U.S.C. § 1983. Such a claim requires an allegation of the violation of a right secured by the Constitution and laws of the United States, and a showing that a person acting under color of state law committed the alleged deprivation. *West v. Atkins*, 487 U.S. 42, 48 (1988).

A. Plaintiff's Motion for Partial Summary Judgment

Plaintiff alleges defendants violated his Fourteenth Amendment due process rights by failing to afford him notice and hearings upon his transfers to the more restrictive D-Unit. He maintains that Title 289 of the Washington Administrative Code (WAC), in combination with Revised Code of Washington (RCW) 70.48.071 and various jail policies, establishes a state created liberty interest in freedom from placement in the RJC's D-Unit.

The procedural guarantees of the Fourteenth Amendment's Due Process Clause apply only when a constitutionally protected liberty or property interest is at stake. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). Liberty interests protected by the Fourteenth Amendment may arise from either the Due Process Clause itself or from state laws. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). A prisoner does not have a constitutional right to a particular classification status. *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987) (citing *Moody v. Daggett*, 429 U.S. 78 (1976)). Therefore, as indicated above, plaintiff asserts a liberty interest in classification arising from state law through the enactment of certain statutory or regulatory measures.

This claim gives rise to an initial dispute regarding the proper test to apply. As discussed below, the question of the appropriate test to apply in determining whether an inmate has a

protected liberty interest under state law depends largely on whether an inmate is a pre-trial detainee or is post-conviction.

In *Hewitt v. Helms*, 459 U.S. 460 (1983), the United States Supreme Court set forth a test looking to whether a State law "set[s] forth '"substantive predicates" to govern official decision making' and . . . contain[s] 'explicitly mandatory language,' *i.e.*, a specific directive to the decisionmaker that mandates a particular outcome if the substantive predicates have been met." *Valdez v. Rosenbaum* , 302 F.3d 1039, 1044 (9th Cir. 2002) (quoting *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989) (quoting *Hewitt*, 459 U.S. at 471-72)). The Supreme Court determined that the State regulations at issue in *Hewitt* created a liberty interest for an inmate to remain in the general prison population based on the mandatory character of the language and the inclusion of substantive predicates. 459 U.S. at 471-72.

The Supreme Court subsequently curtailed the *Hewitt* test in *Sandin v. Conner*, 515 U.S. 472, 484 (1995). It found that the approach in *Hewitt* "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges[,]" and had the "undesirable effects" of discouraging states from codifying prison management procedures and involving federal courts in the day-to-day management of prisons. *Id*. at 481-82. *Sandin* "refocused the test for determining the existence of a liberty interest away from the wording of prison regulations and toward an examination of the hardship caused by the prison's challenged action relative to 'the basic conditions' of life as a prisoner." *Mitchell v. Dupnik*, 75 F.3d 517, 523 (9th Cir. 1996) (quoting *Sandin*, 515 U.S. at 485). Pursuant to *Sandin*, state regulations do not afford a prisoner a protected liberty interest entitling him to procedural protections unless the action by prison officials serves to increase his sentence or results in

"atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. The Supreme Court found, in that case, that a convicted prisoner's placement in disciplinary segregation "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." *Id*. at 486.

The Ninth Circuit Court of Appeals, however, continues to apply the *Hewitt* test in cases involving pretrial detainees. *See*, *e.g.*, *Valdez*, 302 F.3d at 1044 & n.3; *Carlo v. City of Chino*, 105 F.3d 493, 498-99, 499 n.1 (9th Cir. 1997); *Mitchell*, 75 F.3d at 524. In so doing, the Ninth Circuit has noted that *Sandin*'s reasoning applied particularly to convicted prisoners "whose incarceration 'serves different aims' than pre-trial detainees." *Valdez*, 302 F.3d at 1044 & n.3 (quoting and citing *Sandin*, 515 U.S. at 484 & n.5, and noting that the Supreme Court explicitly declined to overrule its prior decisions). That is, while pretrial detainees are incarcerated to ensure their presence at trial and have a liberty interest based in the federal constitution in not being punished without due process, *Carlo*, 105 F.3d at 499 & n.1, """[l]awful incarceration [of convicted prisoners] brings about the necessary withdrawal or limitation of many privileges and rights,""" *Sandin*, 515 U.S. at 485 (quoted sources omitted).

Yet, defendants note that the Ninth Circuit applied *Sandin* to a cell search claim brought by a pretrial detainee in *Mitchell*. In that case, the court found the *Sandin* analysis appropriate where the search was "not imposed as punishment and does not involve a more restrictive level of incarceration to which a sentence is relevant; it is a general security measure of the kind that the Supreme Court has said pretrial detainees may be subjected." 75 F.3d at 523. *See also Carlo*, 105 F.3d at 499 & n.1 (noting *Mitchell's* holding that, in some cases, *Sandin* will apply to the claims of pretrial detainees). *But cf. Valdez*, 302 F.3d at 1042-45 (applying *Hewitt* to plaintiff's

challenge to telephone access restriction upon his placement in administrative segregation).

Here, plaintiff argues the applicability of *Hewitt* based on his status as a pretrial detainee at all times relevant to his claims. Defendants, asserting that plaintiff is not being punished, aver the applicability of *Sandin*. They alternatively argue that, even applying the more lenient *Hewitt* standard, plaintiff nonetheless fails to establish any violation of his right to due process. Giving plaintiff the benefit of the doubt, the undersigned assumes for the purposes of this Report and Recommendation that *Hewitt* applies. In so doing, however, the undersigned concludes that WAC Title 289, RCW 70.48.071, and jail policies, either alone or in combination, do not suffice to create a liberty interest in freedom from D-Unit placement.

1. WAC Title 289 and RCW 70.48.071:

WAC Title 289 contains rules adopted by the Washington Corrections Standards Board. Plaintiff points specifically to WAC 289-16-230, concerning the classification/segregation of prisoners in detention and correctional facilities, and WAC 289-12-030, concerning new detention and correctional facilities, as the sources of the alleged liberty interest. As an initial matter, the parties dispute the continuing validity of Title 289. As noted by defendants, in 1987, the Washington State Legislature abolished the Corrections Standards Board which had adopted Title 289. *See* 1987 Wash. Laws Ch. 462 (governing the transfer of powers, duties, and functions of the Corrections Standards Board). The Corrections Standards Board did not repeal its regulations prior to its dismantling and the State continues to print Title 289 in the WAC. Yet, upon abolishing the Corrections Standards Board, the Legislature determined that:

> All units of local government that own or operate adult correctional facilities shall, individually or collectively, adopt standards for the operation of those facilities no later than January 1, 1988. Cities and towns shall adopt the standards after

> considering guidelines established collectively by the cities and towns of the state; counties shall adopt the standards after considering guidelines established collectively by the counties of the state. These standards shall be the minimums necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff, and specific state and federal statutory requirements, and to provide for the public's health, safety, and welfare. Local correctional facilities shall be operated in accordance with these standards.

RCW 70.48.071; 1987 Wash. Laws Ch. 462 § 17.[4]

Defendants state that it is not clear why the Corrections Standards Board did not repeal its regulations, nor whether the DAJD adopted classification procedures in response to RCW 70.48.071, or continued to follow existing policies or some combination of the two. Responding to plaintiff's arguments, defendants acknowledge that later jail classification policies and case law refer to WAC 289-16-230. *See*, *e.g.*, DAJD Policy 6.03.003 (Critical Inmate Placement) and *State v. Silva*, 107 Wn. App. 605, 629 & n.78, 27 P.3d 663 (2001) (stating that WAC 289-22 "statutorily requires jails to provide access to legal materials," and citing RCW 70.48.180 in stating that WAC 289-22 was promulgated under the authority of the former RCW 70.48.050).

Yet, even assuming the continued validity of WAC 289-16, defendants argue that it does not govern the facts of this case. That is, defendants assert that WAC 289-16 applies to the formal inmate classification and reclassification process, rather than the overrides at issue here. The undersigned finds this distinction dispositive of the issue, and further finds no basis for a liberty interest in WAC 289-12-030.

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[4] In arguing the continued relevance of Title 289, plaintiff points to the fact that, in 1988, the King County Council adopted Title 289 by motion in response to RCW 70.48.071. (Dkt. 96, Ex. B). Defendants respond that this motion to adopt has no legal affect in King County pursuant to its County Charter. (*Id.*, Ex. A.) In any event, for the reasons discussed below, the Court need not further address this issue.

a. WAC 289-16-230:

WAC 289-16-230 states in relevant part:

> . . . The prisoner shall be promptly informed of any classification housing assignment decision other than "general population," and of his right to have that decision reviewed upon making a request. Such notice shall also be given with regard to any reclassification action.
>
> . . . A prisoner who is dissatisfied with his housing assignment shall be entitled to a review of the decision by the department of corrections or chief law enforcement officer upon making a written request, and shall be promptly informed of this right. Such request shall be reviewed by the department of corrections, chief law enforcement officer, or a designated staff member supervisory to the classification committee, within 72 hours of its receipt by staff. The prisoner shall receive a written decision of the review of such assignment, including reason(s).

WAC 289-16-230(2)(c)-(d). As discussed further below, defendants maintain that the D-Unit is a part of the general population, while plaintiff argues it is, in actuality, maintained as a de facto punitive segregation unit. However, even assuming the D-Unit is a housing assignment other than general population, plaintiff fails to establish the applicability of WAC 289-16-230 to his claims.

On its face, WAC 289-16-230 relates to "classification" and "reclassification." There is no evidence plaintiff was ever reclassified. Therefore, WAC 289-16-230 could only relate to plaintiff's initial classification as a close security inmate. However, plaintiff's assertion that he was improperly classified as a close security inmate upon being booked into the RJC is no more than conclusory. (*See* Dkt. 11 at 79-81 (averring consideration of "inaccurate information about [his] charge and behavioral history.")) He fails to support the contention that his initial classification was in any respect improper under the classification system utilized by the RJC. [5]

[5] At best, plaintiff points to an August 4, 2004 letter he sent to defendant Mayes describing the alleged inaccurate information considered. (*See* Dkt. 16, Ex. 6 at 4.) An attached response

Accordingly, plaintiff's conclusory claim regarding his initial classification should be dismissed.[6] The revocation of plaintiff's overrides – a process governed by DAJD policy, rather than Title 289 – is addressed in relation to that policy below.

b. WAC 289-12-030:

WAC 289-12-030(2)(a)(iii)(B) states: "Dining area(s) shall allow conversational opportunities in adequate surroundings. Meals shall not be served in cells, except where necessary for the health, security and/or well-being of prisoners and staff." However, in this case, although plaintiff takes issue with reasons proffered for the establishment of greater restrictions in the D-Unit, he raises no doubt that, as housing for "close security" inmates, the restrictions are grounded in concerns of security. Accordingly, because the WAC provision at issue expressly provides an exception for security-based measures, it does not form the basis for a liberty interest in this case.

2. Jail Policies:

Plaintiff argues that, even if Title 289 does not apply, jail policies provide a sufficient

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from Mayes states that plaintiff's classification "has been reviewed and is appropriate." (*Id*. at 7.)

[6] Moreover, the claim brought forth in plaintiff's amended complaint as to his initial classification is brought solely against an unnamed defendant. (Dkt. 11 at 79-81 (identifying "Mark Moe 1" as the individual who allegedly considered inaccurate information and failed to advise him of his alleged right to a placement review.)) "Doe," or in this case "Moe," defendants are generally disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). However, where the identity of a defendant is not known before filing suit, courts allow a plaintiff the opportunity to identify the unknown defendant through discovery, unless it is clear discovery would not yield the identity or that the complaint would be dismissed on other grounds. *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (citing *Gillespie*, 629 F.2d at 642). In this case, plaintiff appears to identify officers "MConn" and "Okato" or "Kato" in declarations as the individuals responsible for the alleged initial error in his classification. (*See* Dkt. 51 at 21-24 and Dkt. 92 at 2.) However, although he has had ample opportunity to do so, plaintiff has not sought to amend his complaint to clarify the identity of either Mark Moe I or any other unnamed defendants.

procedural framework for the establishment of a liberty interest. He points specifically to DAJD Policy 6.04.003, governing inmate rights and privileges, RJC's classification override policy, and a D-Unit operations memorandum as conferring such an interest. (Dkt. 82, Ex. 2; Dkt. 77, Ex. A; and Dkt. 21, Ex. A.) However, as described below, plaintiff fails to establish that, as a matter of law, any of these jail policies should be construed as creating a liberty interest.

DAJD Policy 6.04.003 defines a "right" as an "entitlement, freedom, or privilege to do something, as provided by law[,]" and a "privilege" as a "benefit or advantage granted by DAJD administration[,]" or "something that is allowed, but that is not guaranteed by law." (Dkt. 82, Ex. 2 at 1.) The policy further notes that "privileges will be based on security level and behavior and may be rescinded partially or completely at the discretion of the Director or his or her designee." (*Id.* at 3.) Privileges include participation in religious services/counseling opportunities, educational and recreational opportunities, and other inmate programs and activities, and "[m]ore frequent dayroom access for shower, phones, and exercise than required by law." (*Id.* at 2-3.) As a general guideline, the policy states that "[r]ights and privileges may be curtailed, rescinded, or revoked if jail security, inmate or staff safety, or major health questions are raised." (*Id.* at 2.) The policy further states that rights or privileges may be restricted or revoked when an inmate is considered an imminent threat to security or to the health or safety of himself or others, and that, when an inmate's rights are restricted, the incident must be documented and forwarded up the chain-of-command for review. (*Id.* at 3.)

The classification override policy states that a "[f]ace to face interview [is] required prior to all decisions to override inmate security level[,]" and overrides "can be done by staff based on good behavior AND time elapsed since: escapes, violent convictions, prison time, or other relevant

factors. (Dkt. 77, Ex. A at 5 (emphasis in original.)) The "David Unit Management Plan" memorandum states that "*[c]lose inmates who exhibit ongoing, good behavior will be reviewed for security reduction and placement in less restrictive housing.*" (Dkt. 21, Ex. A at 3 (emphasis in original.))

In his motion for partial summary judgment, plaintiff asserts that jail policies and rules can create liberty interests because they have the binding force of law when formally adopted. (Dkt. 81 at 5 (citing *Williams v. Lane*, 851 F.2d 867, 880 (7th Cir. 1988) (stating that a jail regulation "had binding force because it was adopted according to proper administrative procedures and required that 'housing and programmatic accommodations [for protective custody inmates] shall be comparable to those provided for the general population.'")) In his reply, plaintiff states that it is well settled law that policy statements which create "'an expectation of receiving process'" do not alone implicate liberty interests, and that there must also be "some state-created *substantive* limitation on the prison officials' discretion." (Dkt. 101 at 10-11 (emphasis in original) (citing *Jones v. Mabry*, 723 F.2d 590, 593 (8th Cir. 1983) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983)))). He argues that DAJD Policy 6.04.003 imposes a substantive limitation on the discretion of prison officials by requiring that an inmate be an imminent threat before rights or privileges may be restricted.

The Court assumes for the purposes of considering plaintiff's motion that all of the jail policies at issue here are of the type that could confer a liberty interest. *See*, *e.g.*, *Baumann v. Arizona Dep't of Corrections*, 754 F.2d 841, 844 (9th Cir. 1985) ("Published prison regulations may create a protected interest. It is unclear whether unpublished administrative policy statements may do so. The Supreme Court has not considered that issue, but circuit courts generally have

held that explicit written pronouncements may create a protected interest.") (internal citation omitted). However, even applying the *Hewitt* analysis endorsed by plaintiff, the Court finds that plaintiff fails to establish as a matter of law that the policies at issue create a liberty interest. As stated above, *Hewitt* requires the Court to consider whether state law "set[s] forth '"substantive predicates" to govern official decision making' and . . . contain[s] 'explicitly mandatory language,' *i.e.*, a specific directive to the decisionmaker that mandates a particular outcome if the substantive predicates have been met." *Valdez*, 302 F.3d at 1044 (quoting *Thompson*, 490 U.S. at 462-63 (quoting *Hewitt*, 459 U.S. at 472)).

Pursuant to DAJD Policy 6.04.003, the particular aspects of close custody at issue here – participation in religious services/counseling opportunities, recreational opportunities, other inmate programs and activities, and dayroom access – are privileges, which are "allowed, but . . . not guaranteed by law[,]" based on security level, "may be" rescinded at the discretion of prison officials, and "may be" restricted or revoked upon a determination that an inmate is an imminent threat. (Dkt. 82, Ex. 2 at 3.[7]) Plaintiff fails to establish that this language satisfies *Hewitt*. Indeed, to the contrary, rather than containing mandatory language, the policy explicitly affords prison officials discretion with respect to the aforementioned "privileges."

The override policy is likewise discretionary and conditional in nature, stating that overrides "can be" performed by prison staff. (Dkt. 77, Ex. A at 5.) Moreover, face to face interviews are required only prior to a decision to override inmate security level, not upon a transfer to a more restricted classification. (*Id.*) This policy, therefore, does not create a liberty

[7] The provision of three meals a day is included as an inmate right, but the policy does not address the location of meals. (Dkt. 82, Ex. 2 at 2-3.)

interest under *Hewitt*.[8] Finally, while the D-Unit memorandum indicates that close custody inmates who exhibit ongoing, good behavior "will be" reviewed for security reduction and placement in less restrictive housing (Dkt. 21, Ex. A at 3), plaintiff fails to establish that this memorandum could be reasonably construed as imposing a substantive limitation on the discretion of prison officials sufficient to establish a liberty interest.[9]

In sum, plaintiff fails to establish that any of the jail policies at issue here impose a substantive limitation on the discretion of prison officials and, therefore, fails to establish a liberty interest pursuant to *Hewitt*. For this reason, and for the reasons described above, plaintiff's motion for partial summary judgment should be denied, and defendants' motion as to these issues granted.

B. Defendants' Motion for Summary Judgment

Defendants' motion for summary judgment seeks dismissal of this case in its entirety. For the reasons described below, the undersigned finds defendants entitled to summary dismissal of plaintiff's remaining claims.

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[8] Plaintiff concedes as much in his supplemental briefing, stating: "Generally, plaintiff agrees with defendants that it is not the revocation of an 'override' that implicates due process requirements; it is the imposition of D-Unit conditions, which resulted from the revokations [stet] in this case, that crossed the obvious constitutional line." (Dkt. 207 (altered to lower case in quotation.))

[9] The Court could consider the argument regarding the D-Unit memorandum waived based on the fact that plaintiff first raised it in his reply. *See*, *e.g.*, *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 725-26 (9th Cir. 1992) (declining to address arguments raised for the first time in a reply brief). However, given the opportunity afforded defendants to submit supplemental briefing in this matter, the Court finds it appropriate to address the issue.

1. Substantive Due Process:

Plaintiff raises a substantive due process claim concerning conditions in the D-Unit. He maintains that various defendants conspired to officially categorize the D-Unit as a general population unit, while maintaining the unit as a de facto punitive segregation unit, with conditions so severe, arbitrary, and excessive as to amount to punishment per se. In particular, plaintiff points to confinement in a cell measured six by twelve feet for all but three hours a day, restrictions on religious activities, cold cell temperatures, shared and dirty mop buckets, old and worn mattresses, in-cell meals, and shared hair clippers without disinfectant.[10]

The Eighth Amendment prohibits the cruel and unusual punishment of prisoners, while the punishment of pretrial detainees is prohibited by the Fourteenth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.") As plaintiff has been both a pre- and post-trial detainee, the undersigned will, for the sake of simplicity, review his substantive due process claim under "'the more protective fourteenth amendment standard.'" *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (quoting *Gary H. v. Hegstrom* , 831 F.2d 1430, 1432 (9th Cir. 1987)). *But cf. Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998) ("Because pretrial detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the Eighth Amendment, however, we apply the same standards.")

The test for identifying unconstitutional punishment at the pretrial stage of a criminal

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[10] Plaintiff also asserted in his motion for partial summary judgment that D-Unit inmates are denied educational and program opportunities available in medium security. However, he does not elaborate on this contention, nor does he raise the issue in his complaint. For these reasons, the Court will not further address this particular issue.

proceeding requires a court to examine "whether there was an express intent to punish, or 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purposes assigned [to it].'" *Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004) (quoting *Bell*, 441 U.S. at 538). "For a particular governmental action to constitute punishment, (1) that action must cause the detainee to suffer some harm or 'disability,' and (2) the purpose of the governmental action must be to punish the detainee." *Id.* at 1029. Further, "to constitute punishment, the harm or disability caused by the government's action must either significantly exceed, or be independent of, the inherent discomforts of confinement." *Id.* at 1030.

It is undisputed that the D-Unit is more restrictive than other units at the RJC. Defendants assert that the close security structure in the D-Unit is needed to maintain internal order and to preserve security and safety. (*See*, *e.g.*, Dkt. 21, at 1-2.) "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell*, 441 U.S. at 546. *Accord Jones*, 393 F.3d at 932 ("Legitimate, non-punitive government interests include ensuring a detainee's presence at trial, maintaining jail security, and effective management of a detention facility.") Moreover, corrections administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547. In this case, the undisputed restrictions in D-Unit – including twenty-one hours of lock down and in-cell meals – appear reasonably related to the legitimate purpose of maintaining security, safety, and order, and do not appear to significantly exceed the inherent discomforts of

confinement. *See, e.g., Frost*, 152 F.3d at 1130 (rejecting pretrial detainee's claim that he was improperly classified as a close custody inmate in light of deference to be accorded to prison officials in adopting policies and practices needed to preserve internal order, discipline, and security); *Chilcote v. Mitchell*, 166 F. Supp. 2d 1313, 1315, 1318 (D. Or. 2001) (confinement of pretrial detainees in cramped, triple-bunked cells for 20 to 21 hours a day did not rise to the level of a constitutional violation in the face of the population-based needs and security concerns). [11]

The parties differ as to the remaining D-Unit conditions challenged by plaintiff. Plaintiff presents numerous declarations supporting his contention as to the unavailability of group religious services (*see* Dkts. 26, 27, 32, 122, 123, 126, 134), as well as one declaration attesting to the availability of a "one-hour 'bible study' every other week[,]" (Dkt. 124 at 3) (quotation converted to lower case). The latter declaration provides support for defendants' contention as to the availability of a bi-weekly religious service. However, even assuming the unavailability of group religious services in the D-Unit, plaintiff fails to elaborate beyond his conclusory allegation as to how the absence of such services – particularly given the undisputed availability of individual religious counseling – constitutes unconstitutional punishment. *See also infra* part B.5 (addressing plaintiff's freedom of religion claim).

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[11] Although plaintiff failed to put forth any arguments in opposition to defendants' motion for summary judgment, the Court previously analyzed arguments raised by plaintiff in support of preliminary injunctive relief relating to both this and his other claims. (*See* Dkts. 104, 106.) For example, the Court distinguished *Lock v. Jenkins*, 641 F.2d 488, 492 (7th Cir. 1981), wherein it was deemed impermissible to confine pre-trial detainees for twenty-two hours a day, as involving cells which measured approximately half the size of the cells in the D-Unit. None of the arguments previously raised by plaintiff alter the conclusion reached in this Report and Recommendation. Also, as previously noted by the Court, both the above-described D-Unit memorandum and the mere fact of plaintiff's initial placement in the D-Unit upon his entry to the RJC provide support for defendants' assertion that the D-Unit is not disciplinary housing. (Dkt. 104 at 13.)

Plaintiff's allegations as to cell temperature, mop buckets, mattresses, and hair clippers are likewise no more than conclusory and fail to create a genuine issue of material fact. RJC employees proffer evidence disputing plaintiff's assertion as to temperature and aver the availability of replacement mattresses and cleaning supplies in the D-Unit upon request. (*See* Dkt. 138 (stating that temperatures are maintained between the range of 71 and 74 degrees and attaching document showing adequate temperatures in the unit over a two-day period) and Dkt. 139 (stating that inmates are responsible for the cleanliness of their cells and can request clean mop bucket water, cleaning supplies – including a disinfectant for cleaning hair clippers, and replacement mattresses upon request; attaching a housing inspection report on cleanliness.)) In contrast, while two declarations submitted by plaintiff assert that "in-unit trustees" are not available in the D-Unit to replace mop water, they do not otherwise sufficiently refute defendants' assertion that clean mop water is available by other means. (*See* Dkts. 26 & 32.) Moreover, one of those declarations merely reiterates plaintiff's conclusory assertion as to cell temperature. (*See* Dkt. 26.) Finally, as with his claim regarding religious services, plaintiff fails to elaborate as to how the conditions as alleged could be conceived as rising to the level of unconstitutional punishment. *Cf. Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (institution complies with the Eighth Amendment in providing sentenced prisoners with "'adequate food, clothing, shelter, sanitation, medical care, and personal safety.'") (quoted source omitted).

In sum, the undersigned concludes that plaintiff fails to proffer more than conclusory assertions that the conditions in the D-Unit constitute impermissible punishment of pretrial

detainees.[12] Accordingly, plaintiff's substantive due process claim should be dismissed.

2. Punishment without Due Process:

Plaintiff alleges punishment without due process with respect to various on-site adjustments to which he was subjected during his confinement at the RJC. Yet, he fails at a fundamental level to demonstrate how these on-site adjustments could be construed as implicating the Due Process Clause. Indeed, the behavior at issue was not considered serious enough to warrant an infraction and subsequent discipline, such as disciplinary segregation or loss of good-time. (Dkt. 142, ¶¶ 5-6.) Plaintiff was, instead, racked back to his cell for limited periods of time. Given this distinction, the due process protections afforded with respect to instances wherein an inmate has been unconstitutionally punished are inapplicable here. *See Wolff v. McDonnell*, 418 U.S. 539, 572 n.19 (1974) ("We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges.") [13] Plaintiff's punishment without due process claims should, therefore, be dismissed.

3. Procedural Due Process Associated with Infraction:

Plaintiff challenges the procedures associated with his June 13, 2004 infraction. As

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[12] Plaintiff also asserts in his complaint that inmates are held in the D-Unit in an effort to exert coercive pressure toward expedited plea agreements and to discourage jury trials. To the extent this assertion implicates the validity of plaintiff's conviction or sentence, such a claim is barred by *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Moreover, plaintiff fails to provide any support for this conclusory argument. In fact, plaintiff did not accept a guilty plea, rather, he was found guilty at trial.

[13] WAC 289-19-220, pointed to by plaintiff, is also applicable. That provision specifically describes procedures required in the face of infractions or "charges of major violation of facility rules[.]" WAC 289-19-220.

described above, following a disciplinary hearing on the infraction, plaintiff was found guilty of being defiant and insolent for admittedly using the word "bullshit," but was not found guilty of the charge associated with his alleged kicking of his cell door. (*See* Dkt. 11, App. 15.) The RJC suspended the imposition of three days of disciplinary deadlock and denied plaintiff's appeal. (*Id.*)[14]

In *Wolff*, the United States Supreme Court outlined the minimum procedures required in the face of disciplinary charges. The Court found that due process requires, *inter alia*, a written statement – addressing the charges, a description of the evidence, and an explanation for the action taken – at least twenty-four hours prior to the disciplinary hearing, that written record be made of the proceedings, and the opportunity to present documentary evidence and call witnesses, unless such an allowance would interfere with institutional security. 418 U.S. at 563-69.

Plaintiff raises a number of claims as to alleged deficiencies in the procedures surrounding his June 13, 2004 infraction, pointing to perceived discrepancies between various provisions of Title 289 and internal RJC policies and the procedures afforded him by the RJC. However, the Due Process Clause requires only that prisoners and pretrial detainees be provided with the minimum procedures mandated by *Wolff*; it does not require compliance with a correctional facility's own, more generous procedures. *Walker v. Sumner*, 14 F.3d 1415, 1419-20 (9th Cir. 1994); *see also Mitchell*, 75 F.3d at 523-26 (describing applicability of *Wolff* to pretrial detainees). In this case, plaintiff fails to allege any facts supporting the contention that the procedures outlined in *Wolff* were not met in this case. (*See* Dkt. 11, App. 15.)

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[14] The parties do not address the practical effect of this "suspended" punishment, if any, on plaintiff's claim.

Plaintiff also avers defendant Hansen lacked impartiality given her knowledge, at the time she denied his appeal, that he had named her as a defendant in a civil suit. "The *Wolff* Court also implied the obvious: that the essence of a fair hearing is an impartial decisionmaker." *Surprenant v. Rivas*, 424 F.3d 5, 16 (1st Cir. 2005) (citing *Wolff*, 418 U.S. at 570-71). *Accord Clutchette v. Procunier*, 497 F.2d 809, 820 (9th Cir. 1974) ("Basic to an accused prisoner's constitutional guarantee of an accurate and fair fact finding determination prior to imposition of sanctions is the right to be heard by an impartial disciplinary committee."), *rev'd on other grounds sub nom. Baxter v. Palmigiano*, 425 U.S. 308 (1976).[15] In this case, plaintiff presents evidence that may support the conclusion that defendant Hansen was aware that she had been named a defendant in a suit filed by plaintiff at the time she denied his appeal. (*See* Dkt. 51, Ex. 47 (letter from plaintiff to Hansen dated June 11, 2004 stating she had been named as a defendant in a lawsuit filed in federal court.))

Although it has not been specifically addressed in the Ninth Circuit, a pending lawsuit against a person serving as a decisionmaker on a prison disciplinary committee could be found to implicate that individual's impartiality. *See, e.g., Malek v. Camp*, 822 F.2d 812, 816-817 (8th Cir. 1987) (finding claim of personal bias by a disciplinary committee member stated a ground for relief under § 1983 where the inmate had prepared and filed a suit on behalf of another inmate against that decisionmaker; remanding for further proceedings); *Redding v. Fairman*, 717 F.2d 1105,

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[15] *See also Wolff*, 418 U.S. at 592 (Marshall, J., concurring) ("[D]ue process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case."); *Willoughby v. Luster*, 717 F. Supp. 1439, 1441-42 (D. Nev. 1989) (finding constitutional right to disciplinary committees not containing members who investigated or witnessed alleged disciplinary violation).

1112-13 (7th Cir. 1983) (finding district court's conclusion that disciplinary committee members could not be named defendants in disciplinary subject's lawsuit "unnecessarily extends *Wolff's* reach[,]" but remanding for consideration of the circumstances involved in the lawsuit and consideration of whether disqualification was required in that particular case). *Cf. Clutchette*, 497 F.2d at 820 ("Nevertheless, provided that no member of the disciplinary committee has participated or will participate in the case as an investigating or reviewing officer, or either is a witness or has personal knowledge of material facts related to the involvement of the accused inmate in the specific alleged infraction (or is otherwise personally interested in the outcome of the disciplinary proceeding), a hearing board comprised of prison officials will satisfy the due process requirement of a '"neutral and detached" hearing body.'") (quoted source omitted).

However, in this case, it is undisputed that Hansen was not a part of the disciplinary committee presiding over plaintiff's infraction. (*See* Dkt. 11, App. 15.) Nor was she involved in the incident giving rise to the infraction. Instead, Hansen's involvement was limited to the fact that she denied plaintiff's appeal of the disciplinary committee's decision. (*Id.*) Plaintiff fails to provide any support for the contention that such involvement fails to satisfy the requirements of *Wolff*. In addition, the undersigned finds relevant the fact that plaintiff points to no more than Hansen's presumed knowledge she had been named as a defendant in a lawsuit at the time she processed his appeal, as well as that, as a classification supervisor, Hansen is likely frequently named as a defendant in cases filed by RJC inmates. *See, e.g., Redding*, 717 F.2d at 1112-13 (noting that defendants in prisoners' rights lawsuits may not know the plaintiff and may have little personal involvement in the case, and that disqualification on this basis alone "would heavily tax the working capacity of the prison staff[,]" and "vest too much control in a prisoner to determine

the Committee make-up.")[16] For these reasons, the undersigned concludes that plaintiff's denial of due process claim based on Hansen's alleged lack of impartiality should also be dismissed.

4. Retaliation:

Plaintiff alleges defendants retaliated against him in response to his filing of grievances and lawsuits.[17] He has a First Amendment right to utilize prison grievance procedures. *See Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). To prevail on a retaliation claim under § 1983, however, plaintiff must show he was retaliated against for exercising his constitutional rights, that the retaliatory action chilled the exercise of his First Amendment rights, and that the retaliatory action did not advance legitimate penological goals, such as preserving institutional order and discipline. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000); *Barnett v. Centoni.* 31 F.3d 813, 816 (9th Cir. 1994). Also, the Court evaluates a retaliation claim in light of the deference accorded prison officials. *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995).

Plaintiff first alleges retaliation in the form of a rack back of his entire unit. He points to a June 11, 2004 grievance he filed asserting defendant Rogers' practice of group punishments, including an instance when Rogers racked back the entire unit based on noise. (Dkt. 11, App. 7.)

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[16] (*See also* Dkt. 77, ¶ 9 (declaration from Teri Hansen stating: "I personally do not care that [plaintiff] writes or sues my employer or myself. It is not uncommon for this to happen and I believe I respond to each of these lawsuits with professionalism and fairness."))

[17] Plaintiff also avers retaliation based on defendants' alleged desire to keep him away from other pretrial detainees due to his provision of legal assistance and the exposure of violations through his grievance and litigation activities. However, this assertion is wholly conclusory and does not warrant further discussion.

Plaintiff asserts that Rogers and defendant Jones thereafter conspired to retaliate against him by again racking back the unit, on this occasion based on a derogatory comment. (*See id.* at App. 8 & 9.) Yet, plaintiff's claim that this second onsite adjustment against a group of inmates was taken in retaliation for his grievance against Jones is attenuated at best. Moreover, he fails to proffer any support for his bare assertion that the action in question did not advance legitimate penological goals, such as preserving institutional order and discipline. *See Pratt*, 65 F.3d at 806 ("The plaintiff bears the burden of pleading and proving the absence of legitimate correctional goals for the conduct of which he complains.") Nor does plaintiff show that his First Amendment rights were in any way chilled by the actions of defendants. *See Resnick*, 213 F.3d at 449.

Plaintiff next alleges retaliation through his transfers back into the D-Unit following the revocation of his overrides. The RJC revoked plaintiff's first override to medium security after he was found guilty of engaging in defiant and insolent behavior (*see* Dkt. 11, App. 15 and Dkt. 97 at C), and the second following a dispute between plaintiff and defendant Coleman, in which he was deemed to have engaged in challenging and disruptive behavior (*see* Dkt. 97, Ex. C). These circumstances present non-retaliatory reasons for plaintiff's transfers back into the D-Unit. As with the preceding claim, plaintiff fails to demonstrate that defendants' actions did not advance legitimate correctional goals, *see Pratt*, 65 F.3d at 806, or that his First Amendment rights were chilled by the actions of defendants, *see Resnick*, 213 F.3d at 449.[18]

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[18] Although plaintiff asserted in association with one of his motions for preliminary injunctive relief that defendant Coleman had retaliatory motives against him, the Court noted that evidence proffered in support of this contention was largely based on hearsay or opinions regarding Officer Coleman's reputation. (*See* Dkt. 104 at 15-16.) Moreover, plaintiff's own description of the events in question provides support for defendants' contention that plaintiff had engaged in challenging behavior. (*See* Dkt. 11 at 64-70.)

Lastly, plaintiff challenges as retaliatory activity his continued housing in D-Unit and classification as a close security inmate following the revocations of his overrides. As reflected in previous orders denying plaintiff's requests for preliminary injunctive relief, this claim presents a closer question given defendants' admitted consideration of plaintiff's grievance activity with respect to these decisions. (*See* Dkts. 104 & 106.) Nonetheless, after close consideration of this issue and the voluminous materials before the Court, the undersigned also finds defendants entitled to summary dismissal of this retaliation claim.

Defendants acknowledge that plaintiff's practice of filing "multiple complaints, demands and lawsuits" has been a factor in decisions regarding his classification. (Dkt. 77, at 2.) (*See also* Dkt. 51, Ex. 60 (a December 2, 2004 notation states with respect to plaintiff: "Continues to challenge departmental policies and procedures via grievances and possible law suits. Thus unable to authorize any override security per CPS supervision.") (quotation converted to lower case.)) Defendant Hansen asserts that plaintiff's use of the grievance system rises to the level of harassment, describing hundreds of repetitive kites and grievances, maintaining that plaintiff's "enormous demands" on the RJC "can disrupt the flow of services to other inmates due to staffing and resource limitations[,]" and asserting her belief that plaintiff "seems to make deliberate attempts to create situations that become the basis for additional complaints[.]" (Dkt. 77 at 2.) Ms. Hansen further states that plaintiff "challenges and abuses staff and willfully disrupts operations" and "encourages other inmates to engage in similar behavior[.]" (*Id.* at 3.) Sergeant Dreyer asserts that plaintiff's conduct harasses and distracts officers and disrupts jail operations, and that this disruption and harassment represents a serious threat to the safe, orderly, and secure operation of the facility. (Dkt. 78 at 2-3.) Defendant DeNeui states that the hundreds of

grievances and kites filed by plaintiff amount to harassment, are "designed to disrupt the internal order of the jail by flooding the system[,]" take time away from serving other inmates, impact operations, and "must be managed to maintain internal order." (Dkt. 97 at 4.) (*See also* Dkt. 142 at 5-6 (Major William Hayes states that plaintiff "abused the grievance process" by filing hundreds of grievances and kites.)) Defendants, therefore, argue that the RJC "has a legitimate penological interest in preventing Mr. Silva from being reduced to a lower security level based on the behavior he has exhibited and negatively influencing other inmates." (Dkt. 77, at 4.)

Although the precise volume is disputed, the evidence before the Court unequivocally establishes plaintiff's status as a prolific filer of grievances and kites during his stay at the RJC. (*Compare*, *e.g.*, Dkt. 142 at 5-6 and Exs. B & C (asserting plaintiff's own filing system shows he wrote over 600 grievances and hundreds of kites during his incarceration; attaching numerous grievances and kites), *with* Dkt. 92 at 4 & 8 (asserting that he filed about 100 grievances and at least 100 kites during his stay at the RJC.)) In addition, a review of that evidence confirms practices identified by defendants as abusive, including duplicative filings and filings based solely on plaintiff's dissatisfaction with the content and timeliness of responses received in regard to previous grievances and kites. (*See*, *e.g.*, Dkt. 142.) Further, declarations submitted by defendants outline the detrimental effects of these practices on the internal order, security, and safety of the facility. (*See* Dkts. 77-78, 97, 142.) Finally, it should be noted both that plaintiff was classified as a close security inmate and housed in the D-Unit when he entered the RJC in April 2004, before he filed any grievances and lawsuits, that he was indisputably subject to a number of onsite adjustments during his detainment, and that his behavior – apart from his grievance activity – twice resulted in his return to the D-Unit.

The Court accords prison officials "'wide-ranging deference in the adoption of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" *Frost*, 152 F.3d at 1130 (discussing within the context of a prisoner's classification as a close security inmate) (quoting *Bell*, 441 U.S. at 540). Here, the above-described evidence supports defendants' contention that the consideration of plaintiff's grievance activity in decisions associated with his housing and classification was not retaliatory; rather, it was a reasonable attempt to minimize plaintiff's opportunity to disrupt the functioning of the RJC and, therefore, was grounded in concerns of internal order and discipline, security, and safety. *Cf. Rouse v. Benton*, 193 F.3d 936, 941 (8th Cir. 1999) (inmate may be transferred for filing frivolous or repetitive grievances). In turn, plaintiff fails to establish either the absence of legitimate correctional goals for defendants' actions, *see Pratt*, 65 F.3d at 806, or a resulting chilling effect on his First Amendment rights, *see Resnick*, 213 F.3d at 449. For these reasons, and for the reasons described above, all of plaintiff's retaliation claims should be dismissed.

5. Religion:

Plaintiff avers defendants violated his First Amendment Right to practice his Christian faith. Specifically, he maintains defendants violated this right by denying him the opportunity to attend weekly worship services, as well as a mechanism by which to mail tithes.

In order to establish that defendants violated his right to exercise his religious beliefs, plaintiff must show they "burdened the practice of his religion, by preventing him from engaging in conduct mandated by his faith, without any justification reasonably related to legitimate penological interests." *Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir.1997) (internal footnote omitted) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). In assessing the reasonableness of the

challenged conduct, the Court looks to, *inter alia*, whether there is a logical connection between the regulation at issue and a legitimate government interest, whether alternative means to exercise the asserted right exist, and the impact the requested accommodation would have on prison resources. *Id*. (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350-52 (1987) (citing *Turner*, 482 U.S. at 84-89.)) "In order to reach the level of a constitutional violation, the interference with one's practice of religion 'must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.'" *Id*. at 737 (quoting *Graham v. C.I.R.*, 822 F.2d 844, 851 (9th Cir. 1987)).

In this case, plaintiff fails to establish a violation of his right to practice his religious beliefs. There is no evidence weekly attendance at group worship services or tithing is mandated by plaintiff's Christian faith. In fact, plaintiff merely expresses his "desire[]" to engage in these practices. (Dkt. 11 at 82.) Moreover, plaintiff does not dispute the fact that D-Unit inmates are afforded other opportunities for practicing their religious beliefs, including access to individual religious counseling upon request, or explain how those opportunities do not suffice to meet the mandates of his faith. *See, e.g., Zatko v. Rowland* , 835 F. Supp. 1174, 1177 (N.D. Cal. 1993) (finding legitimate penological interests for denying inmate access to group religious services and noting inmate could "worship by other means such as choosing a religious advisor from one of many denominations or possessing religious literature in his cell.") Nor does he dispute the apparent lack of evidence to support any attempts on his behalf to afford himself of such opportunities. (*See, e.g.,* Dkt. 97 at 4.) Finally, as discussed above, defendants proffer justifications for the greater restrictions in the D-Unit based on the legitimate purposes of maintaining order, security, and safety. For these reasons, plaintiff's freedom of religion claim

should be dismissed.[19]

Conclusion

For the foregoing reasons, this Court recommends that plaintiff's partial motion for summary judgment be DENIED, that defendants' motion for summary judgment be GRANTED, and that this matter be DISMISSED with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 17th day of January, 2005.

Mary Alice Theiler
United States Magistrate Judge

[19] In finding the underlying claims subject to dismissal, the undersigned need not address plaintiff's related "failure to supervise/train" claims. Likewise, because it otherwise finds plaintiff's claims subject to dismissal, the undersigned need not address defendants' arguments as to the lack of personal participation on the part of certain defendants, the holding of *Monell v. Department of Soc. Servs.*, 426, U.S. 658 (1978), or qualified immunity.